THE SUPREME COURT OF MISSOURI

M. A.

Appellant

vs.

M. S.

Respondent

No. SC 86006

Appeal from the St. Louis County Circuit Court
The Honorable Joseph A. Goeke III, Judge
Transferred by the Missouri Court of Appeals, Eastern District

SUBSTITUTE REPLY BRIEF

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ARGUMENT

I.

The application of MO. REV. STAT. §§ 452.375.3 and 452.400.1 does not deprive M. S. of due process or equal protection of the law.

M. S. argues that the application of §§ 452.400.1 and 452.375.3 would abridge his right to maintain a parental relationship with the minor children R. S. and J. S. without due process of law. Resp.'s Br. at 20-24. He also contends that the statutes deprive him of equal protection with respect to that right because "the statutes are [not] necessary to accomplish a compelling state interest." *Id.* at 24-26. Those constitutional challenges have been asserted for the first time in this Court, and thus they have been waived. Further, whatever interest M. S. may have enjoyed with respect to ongoing association with his children never was absolute: the state may terminate parental rights altogether in order to protect children from harm, and something less than termination occurs by the application of §§ 452.375,3 and 452.400.1. *See In re M. D. R.,* 124 S.W.3d 469, 476 (Mo. 2004). The statutes now challenged by M. S. deny him neither due process nor equal protection of the law.

A. Waiver

This Court recently reiterated the requirement that constitutional challenges be raised at the first opportunity [and] preserved at each stage of review." *State ex rel. Tompras v. Board of Election Commissioners of St. Louis County,* 136 S.W.3d 65, 66 (Mo. 2004). The rationale of that requirement is to prevent surprise to other

litigants and to afford each court "an opportunity to fairly identify and rule on the issues." *Id.* The rule also reflects this Court's recognition that "[a]n attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance for Redevelopment of Kansas City v. Kansas University Endowment Association,* 805 S.W.2d 173, 715-76 (Mo. 1991).

The trial court record reflects no constitutional challenge to §§ 452.375.3 or 452.400.1. Nor did M. S. bring his challenge to the attention of the Court of Appeals before M. A. had filed her brief and argued the case, and the court had proceeded to rule on her appeal. In fact, M. S. filed no brief and made no argument in that court at all. This Court has held:

> If the constitutional question was not raised and preserved in the trial record it cannot be in the case on appeal, since our appellate jurisdiction is derivative and so limited by the Constitution. When we wrongfully accept it on the unraised constitutional ground this court is violating the Constitution as much as the litigants.

City of St. Louis v. Butler Company, 219 S.W.2d 372, 378 (Mo. 1949). The constitutional challenge asserted by M. S. should be rejected for that reason.

B. Due Process

M. S. argues that §§ 452.375.3 and 452.400.1 deprive him of a fundamental right without affording him "notice and a right to be heard," and that the statutes

thus deny him due process. He relies upon *Hamdi v. Rumsfeld,* 1124 S.Ct. 2633 (2004), for that proposition. *Hamdi* arose from the federal government's detention of a United States citizen as a foreign combatant. The Supreme Court held:

> [A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.

Id. at 2648. The Court explained that due process requires "that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Id.* (quoting *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985)).

Hamdi does not say that it is a violation of due process to detain United States citizens or anyone else on the basis of their status as enemy combatants—only that Mr. Hamdi was entitled to an opportunity to challenge the factual basis for his classification. Nothing in the legislation challenged by M. S. authorizes the termination or denial of visitation and custody without notice of the termination proceeding and without an opportunity to rebut the allegation that a particular parent has pled or been found guilty of a child molestation felony. That would be the due process violation in this case. It did not occur.[1]

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[1] M. S. was not entitled to an opportunity to disprove his present dangerousness:

Lewandowski v. Danforth, 547 S.W.2d 470 (Mo. 1977), relied upon by M. S. for the same proposition regarding the requirement of notice and hearing, explains that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 472. Nothing in *Lewandowski* comes close to suggesting that M. S. was entitled to more than a reasonable opportunity to challenge the facts that established his status as a parent who had committed sexual molestation felonies against his own child. Nothing in the present record suggests that he was denied that opportunity.

M. S. spends a great deal of his argument establishing the importance that society and law assign to the relationship between parents and their children. Then he expresses incredulity—and constitutional outrage—that the legislature might establish a "bright line test" for the entitlement of a parent to continue having access to and control of a child against whom he has committed sexual molestation felonies. That "bright line test" is nothing less or more than a declaration of the state's policy recognizing the great likelihood of recidivism

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> "[T]he fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law . . . [T]he law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.

Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 7 (2003).

among child molesters—especially those who have sexually assaulted their own children—and the state's policy that the protection of children previously molested by their own parents requires the cessation of state-approved access for the felon-parent. M. S. has not begun to refute the reasonableness of that policy.

The reasonableness of the policy is patent. The United States Supreme Court recently recognized that "[s]ex offenders are a serious threat in this Nation," that "[t]he victims of sex assault are most often juveniles," and that prior sex offenders "are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Connecticut Department of Public Safety v. Doe*, 123 S.Ct. 1160, 1163 (2003). The Court previously has held that states have "a compelling interest in protecting children from sexual abuse." *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 617 (1982).

In his brief M. S. has done nothing more than propose an alternative policy for protecting the best interest of victimized children: that he and others convicted of the felonious sexual abuse of their children be afforded an opportunity to convince a judge that they will not re-offend against those same victims. The record in this case is a fine illustration of why a legislature determined to protect once-molested children from further harm might choose to reject the method advocated by M. S. Despite the fact that not one of the several mental health experts who testified was prepared to say that M. S. represented no risk of committing another sexual assault against a child of his own—and the presence of M. S.'s own admission that he remains a pedophile and ample expert testimony

that he remains a threat to re-offend—a Circuit Judge granted him unsupervised access to his son. That judge also promised to remove the supervision from visits between M. S. and the daughter who had been his victim throughout the time that he enjoyed unrestricted access to her. It is preposterous to insist that the legislature was bound by the Constitution to reject the child-centered measure that it selected and choose instead the offender-centered scheme endorsed by M. S.

C. Equal Protection

M. S. contends that he and other people who have pled or been found guilty of felonious molestation of their own children still have a "fundamental right" to "parent their children." He argues that §§ 452.375.3 and 452.400.1 impinge upon that right, that the statutes thus must be subjected to "strict scrutiny" to determine whether they are necessary to accomplish a compelling state interest, that "[t]o pass strict scrutiny review, a governmental intrusion must . . . be narrowly drawn to express the compelling state interest at stake," and that the statutes at issue are not narrowly drawn and must be declared unconstitutional. That argument is a house of cards waiting for a light breeze to blow it down.

First, whatever fundamental right a parent in M. S.'s circumstances may once have enjoyed to associate with his children and direct their upbringing has been fettered since he pled guilty to the felonious molestation of his daughter, apparently committed in the presence of his son, and admitted that the number of his actual offenses exceeded the number of offenses charged against him. Surely M. S. is mindful that his children enjoy a right—made a competing right by his

own criminal conduct—to be safe from sexual abuse. *See State v. Crisp*, 629 S.W.2d 475, 478 (Mo.App.S.D. 1981). And he ought to know as well that the state is obliged at the very least to refrain from affirmatively placing those children in harm's way. *See Burton v. Richmond*, 370 F.3d 723, 727 (8th Cir. 2004).

More to the point, the state has a compelling interest in protecting all of its children from sexual abuse, *Globe Newspaper Company*, 457 U.S. at 617, and the custody and visitation prohibitions codified in §§ 452.375.3 and 452.400.1 are a narrowly drawn means for achieving that objective. M. S.'s sole alternative suggestion—that he and others with like records be given a crack at persuading a trial judge that they do not really pose a threat to their children—is not a plan in which the state is required to rest its confidence.

The evidence in this case suggests the uncertainty that would attend such an inquiry:

- Although M. S. had remained in a court-ordered rehabilitation program for six years, longer than any of the 7,000 other participants in the history of the program had needed to complete their treatment, the program director testified that he still had "deviant sexual tendencies" and that he should not be left alone with his children. Ex. 6 at 22, 59-60, 97.

- No expert was prepared to testify that M. S. was at zero risk of re-offending. Several found him to be clearly at risk.

• The one therapist who found it "really pretty unlikely" that M. S. would sexually abuse either of his children noted his disagreement with the "popular notion" that child molesters have a high rate of recidivism. Tr. at 204.

• M. S. identified himself as a pedophile and explained that his children would be safe with him because "[t]hey're old enough to report." Tr. at 38, 88, 96-97.

The legislature was well within the ambit of its discretion in choosing a dependable means for protecting children from parents with a history of sexually abusing them.

M. S. also complains that § 452.375.3 and 452.400.1 are flawed because they protect a child only from a parent who has committed sex felonies against her, and not from "a serial murderer, an arsonist, or a rapist." Resp.'s Br. at 26. This Court has made it clear that a state need not remedy all potential evils at the same time, and that a sexually abusive parent cannot complain of invidious discrimination because the legislature has not enacted measures to deal with all other felons. *Gem Stores, Inc. v. O'Brien,* 374 S.W.2d 109, 117-18 (Mo. 1963).

That the legislature opted for a comprehensive means of protecting children from the recidivism of parents who previously had committed felonious sexual offenses against them, and did not choose a less certain method that also might have imposed less upon the freedom parents with a proven history of such offenses, does not ipso facto render the legislators' election unconstitutional. This

Court has identified the following "well-established standards" for judging the constitutionality of a statute:

> First, statutes are presumed to be constitutional, and this Court is to construe any doubts regarding a statute in favor of its constitutionality . . . In addition, statutes will be upheld unless they "clearly and undoubtedly" violate constitutional limitations . . . Finally, the party raising the challenge bears the burden proof demonstrating that the statute is unconstitutional.

McEuen v. Missouri State Board of Education, 120 S.W.3d 207, 209 (Mo. 2003). Elsewhere the Court has explained that the constitutional violation must be plain, palpable, and beyond doubt, and has emphasized that the burden of demonstrating constitutional infirmity is "extremely heavy." *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. 2003).

M. S. has not nearly satisfied his burden of demonstrating the overbreadth of §§ 452.375.3 or 452.400.1.

II.

Sections 452.375.3 and 452.400.1 are not laws with retrospective operation within the contemplation of MO. CONST. art. I, § 13.

M. S. argues that the application of §§ 452.375.3 and 452.400.1 to terminate his entitlement to visitation with R. S. and J. S. amounts to a retrospective extinguishment of a vested and substantive right and thus violates Art. I, § 13, of the Missouri Constitution. That argument depends upon the proposition that parents enjoy an unalterable right to the continuation of access to their children. M. S. has not demonstrated the existence of such a right, nor could he. This Court should reject his argument that Art. I, § 13, renders §§ 452.375.3 and 452.400.1 unconstitutional.[2]

Art. I, § 13, provides "[t]hat no ex post facto law, nor law . . . retrospective in its operation . . . , can be enacted." That provision "does not mean that no statute affecting past transactions may be passed, "but rather that none can be

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[2] M. S. waived this constitutional argument by failing to present and preserve it in the Circuit Court and the Court of Appeals. *See* Point I, *supra*. Although M. S. denominates his constitutional objection as one based upon the prohibition of ex post facto laws, it is not. Art. I, § 13, prohibits ex post facto laws and separately prohibits laws with retrospective application. M. S. has premised his argument on the proscription of laws with retrospective application. The record reflects no such constitutional objection in any court prior to this one.

allowed to operate retrospectively . . . to the substantial prejudice of parties interested." *Fisher v. Reorganized School District No. R-V of Grundy County*, 567 S.W.2d 647, 649 (Mo. 1978). A statute has that prohibited effect only "if it takes away or impairs a vested or substantial right or imposes a new duty in respect to a past transaction." *Beatty v. State Tax Commission,* 912 S.W.2d 492, 496 (Mo. 1995). Neither § 452.375.3 nor § 452.400.1 takes away "a vested or substantial right" within the contemplation of the constitutional prohibition.

This Court explained in *Beatty* that in order for a right to be protected by Art. I, § 13, against retrospective restriction, that right "must be something more than a mere expectation based upon anticipated continuance of the existing law": it must, in fact, "have become a title, legal or equitable, to the present or future enjoyment . . . of the demand." *Id.* The Court added that individuals generally do not have a vested right "in a general rule of law or legislative policy that would entitle [them] to insist that a law remain unchanged." *Id.*

In *Beatty*, taxpayers claimed that the legislature's reclassification of certain types of real property for the purpose of assessing taxes, and its enactment of a provision for the recoupment of lost tax revenue, violated Art. I, § 13. 912 S.W.2d at 494. This Court reasoned that the challenged statute "operates retrospectively only if appellants had [vested] a right to pay a certain amount of tax." *Id.* at 496. The Court concluded that the taxpayers "had no more than an expectation that the legislature would not alter the definition of residential property. Id. at 497. It rejected the Art. I, § 13, challenge because "[a] vested right is more than a mere

expectation that a particular law will continue in effect." *Id.* Similarly, in *Kocherov v. Kocherov,* 775 S.W.2d 539 (Mo.App.W.D. 1989), the Court of Appeals observed that judgments providing for child support are subject to modification by the trial court, and thus that "there can be no vested right in a parent or a child to receive child support." *Id.*

In the present case, M. S. had no more than an expectation that the visitation and custody statutes that had allowed him limited access to his children after he had pled guilty to molesting one of them would remain unchanged. The legislature determined that the welfare of children once victimized by sexually abusive parents would be served best by precluding visitation with or control by those parents. The ensuing enactment of that policy into law did not deprive M. S. of any right in which he had an expectation of uninterrupted enjoyment.

M. S. suggests that he "might have taken a different course" if he had known that his guilty pleas would result in the termination of access to or control over his children. Resp.'s Br. at 31. Surely M. S. is not suggesting that he might have proceeded to trial: his repeated confessions of molestation crimes numbering more than the counts of his indictment, his continued abuse of R. S. after once having confessed, and his acknowledgment that he had traveled to Peru to find adoptive children and had begun molesting the six-month-old infant who would become his daughter as soon as he laid eyes on her, do not suggest that trial was a meaningful option or that it could have improved his prospects for ongoing contact with his children.

M. S. insists that both the federal and state constitutions grant him "a substantive, fundamental right" to associate with and control his children. Resp.'s Br. at 31. He complains that the application of §§ 452.375.3 and 452.400.1 to eliminate his access to R. S. and J. S. is "a gross injustice" and "could not more clearly constitute a constitutionally prohibited ex post facto law." Resp.'s Br. at 31. The interest that M. S. enjoyed in having access to and influence over his children never was absolute and always was subject to restraint in the service of the state's obligation to protect his children from harm. Because M. S. had no entitlement to the continued existence of prior visitation and custody legislation, *Beatty,* 912 S.W.2d at 496, the legislature's imposition of such restraint did not violate Art. I, § 13.

III.

Sections 211.442 and 452.400.1 can be harmonized and the application of § 452.400.1 to an existing visitation award would not deprive M. S. of equal protection.

M. S. argues that MO. REV. STAT. §§ 211.442 *et seq*. and 452.400.1 "effectively cover the same subject matter, termination of parental rights," and that to the extent they cannot be reconciled with one another the more general statute—§ 452.400.1, in the estimation of M. S.—must give way to the more specific. To the extent that the statutes deal with the same subject matter the operation of each can be reconciled with that of the other. If that were not the case provisions of § 211.442 *et seq.*— the general statutes governing termination of parental rights for a variety of reasons including conviction of certain molestation felonies—would give way to the very specific provisions of § 452.400.1 regarding the consequences of molestation convictions in the context of visitation.

"Statutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes." *State ex rel. Riordan v. Dierker,* 956 S.W.2d 258, 260 (Mo. 1997). Section 452.400.1 operates when a Circuit Court is called upon to declare the visitation rights of a parent who has come before the court in a dissolution of marriage proceeding and who previously has pled or been found guilty of a child molestation felony. But not every parent who has been prosecuted successfully for a child molestation felony subsequently appears in divorce court. For those who do not, Chapter 211 affords juvenile officers and

juvenile courts statutory authority and a statutory method for preemptive adjudications. Contrary to the suggestion of M. S., there is no irreconcilable conflict between § 452.400.1 and § 211.442 *et seq.* with respect to the termination or limitation of a once-abusive parent's access to the children whom he victimized.

If there was such a conflict, § 452.400.1 would prevail because of its specificity. "A specific statute prevails over a general one." *State ex rel. Fort Zumwalt School District v. Dickherber*, 576 S.W.2d 532, 536 (Mo. 1979). This Court explained:

> Statutes must be read in pari material and, if possible, given effect to each clause and provision. Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general.

Id. at 536-37. Section 452.400.1 deals specifically with the visitation consequences of pleading or being found guilty of a sexual molestation felony committed against a child whose custody has come before a divorce court. Section 211.442 *et seq.* deal generally with the authority of juvenile courts to terminate parental rights for a variety of reasons, one of which is having pled or been found guilty of certain molestation felonies against any child. Although it is M. A.'s position that the statutes are not in conflict, it is apparent that § 452.400.1

is the more specific statute with respect to the effect of custody on the adjudication of visitation rights.

M. S. complains that § 452.400.1 prescribes a "bright line test" for determining whether visitation can be granted. Resp.'s Br. at 33. He points out that § 211.447 "does not set out a bright line test for termination," but rather invests juvenile courts with authority to consider a variety of factors and then discretion to decide upon the consequences of their findings. *Id.* at 34-35. Bright line tests are specific. Discretion is fuzzy.

M. S. suggests that the "bright line" rule of § 452.400.1 deprives him of equal protection. The apparent rationale of that contention is that "Father must be afforded the same opportunity to a right to be heard as is guaranteed under the Missouri and U. S. Constitutions in terminations of parental rights." Resp.'s Br. at 36. As explained in Point I of this brief, *supra,* M. S. waived that constitutional argument by failing to present it in any court before this one. *See State ex rel. Tompras v. Board of Election Commissioners of St. Louis County, supra,* 136 S.W.3d at 66; *Land Clearance for Redevelopment of Kansas City v. Kansas University Endowment Association, supra,* 805 S.W.2d at 715-16; *City of St. Louis v. Butler Company, supra,* 219 S.W.2d at 378. Further, M. S. has demonstrated neither that the denial of visitation pursuant to § 452.400.1 is tantamount to the termination of parental rights nor that the federal or state constitution requires more process than he has been afforded before a parent guilty of sexually molesting his child may be denied visitation with that child. *See Etling v. Westport*

Heating & Cooling Services, Inc., supra, 92 S.W.3d at 773 (holding that the burden of proving a statute constitutionally infirm is extremely heavy and rests upon the challenger).

IV.

Section 452.400.1 is applicable in proceedings to modify existing visitation orders as well as in new custody proceedings.

M. S. argues that § 452.400.1 applies when a parent seeks a new award of visitation rights and not where a request for the modification of a prior award is at issue. Resp.'s Br. at 38-42. The rationale of that argument appears to be that § 452.400.2 "contains provisions relating to the modification of existing visitation orders" and that "[e]ach time either parent has sought a modification of the existing parenting plan, the standard to be applied was set forth in § 452.400.2." Resp.'s Br. at 39-40. As the Court of Appeals concluded in this case, M. S.'s invocation of the Circuit Court's jurisdiction subjected him to the law as it existed when his motion was filed. *M. A. v. M. S.,* No. ED 82018, 2004 Mo. App. LEXIS 679 at *12 (Mo.App.E.D. May 11, 2004) (citing *Hoskins v. Box,* 54 S.W.3d 736, 738-41 (Mo.App.W.D. 2001)).

M. S. recites the parties' 1999 stipulation that he had completed his court ordered counseling and was "not required to attend regular counseling sessions" with that counseling service unless its director recommended additional therapy. Resp.'s Br. at 40-41. M. S. purports to extrapolate the following proposition from that stipulation: "This . . . shows Mother believed that Father did not require further counseling, and that she believed that his visitation rights should be expanded, not terminated." Id. at 41. First, the stipulation does not reflect M. A.'s belief that M. S. "did not require further counseling," but rather her acquiescence

in the notion that the need for further counseling would be left up to a pedophilia professional. Further, nothing in the quoted stipulation text begins to suggest that M. S.'s visitation rights "should be expanded."

M. S. characterizes M. A.'s reliance upon § 452.400.1 as a basis for terminating his visitation rights as "disingenuous" and "a deliberate and desperate attempt to undermine Father's legitimate rights to enjoy a reasonably normal relationship with his children." Resp.'s Br. at 41. That is a harsh judgment indeed. Disingenuous means less than straightforward. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 534 (3rd ed, 1996). There is nothing disingenuous in a mother's realization that child custody legislation has been amended so that courts thenceforth would be required to deny visitation to parents with a proven history of sexually molesting their own children, or in her request for the application of the new law for the benefit of her children. As for M. S.'s claim of an entitlement "to enjoy a reasonably normal relationship children with his children": first, the legislature doesn't think so; and second, it is disingenuous for M. S. to blame M. A. for limitations that have been or may be placed upon his relationships with his children since he repeatedly molested his infant daughter.

The Court of Appeals was correct in finding § 452.400.1 applicable to the question of visitation in this case. M. S. has suggested no substantive basis for avoiding that application. The judgment of the Circuit Court, which was based upon that court's refusal to apply § 452.400.1, should be reversed.

V.

The Circuit Court's finding that the best interests of R. S. and J. S. would be served by granting M. S. unsupervised visitation with each of them was against the weight of the evidence.

M. S. contends in his Point V that the weight of the evidence supported the Circuit Court's findings that the best interests of R. S. and J. S. would be served by removing the supervision from their visits with him. He suggests that this Court is effectively bound by trial court's credibility determinations and its assessment of the weight to be assigned particular evidence. Resp.'s Br. at 44. In fact the evidence in this case was a catalog of reasons to continue the supervision of any visitation that M. S. may have with his children. *See* Appellant's Br. at 6-28, 50-58. The judgment of the Circuit Court should be reversed because it cannot be reconciled with any reasonable conception of the children's best interests.

M. S. contends that a trial court is at liberty to believe or disbelieve some or all of the testimony of every witness, and that an appellate court must indulge the trial court in its processing of that evidence. *Id.* at 44. M. S. proceeds to suggest that the findings of the trial court were amply supported by the testimony of his own expert witnesses. Resp.'s Br. at 45-46, 48-51.

One of the witnesses was Mark Robinson, who had supervised M. S. in a 12-week program and whose recommendation of additional counseling was not heeded by M. S. Tr. at 206, 215-16, 223, 238-39, 262-63. Mr. Robinson stated his opinion that it was "really pretty unlikely" at present that M. S. would molest

his children. Tr. at 204. He also testified that he disagrees with the "popular notion" that child molesters have a high rate of recidivism. Tr. at 204. Mr. Rosen said that he never had interviewed the children and that it would be "a cause for alarm" if they lacked the will to challenge their father when necessary. Ex. K at 2. He acknowledged that another clinician who had interviewed and tested the children had found that "the children . . . did not have the ego strength to challenge their father." Ex. K at 2.

The other expert called by M. S. was a psychologist named Dean L. Rosen. Tr. at 101. Dr. Rosen opined:

> While M. S. does have some personality traits which would be consistent with turning to an infant child for sexual stimulation, nothing in his current life situation would suggest that he currently presents a danger to his own children or the two sons of his current wife.

Ex. G at 8. He testified that the children should be safe with M. S. because "their father is not likely to act out sexually against them as 12-year-olds." Tr. at 141-42. Dr. Rosen stated his belief that M. S. can control his impulses "with respect to sexual abuse," but reported that psychological testing "suggested that he could become too easily swept up by his own needs, conflicts, and emotions," and that "at times he may not be able to always use his strong value system to control [his] impulses." Tr. at 127. The notion that those witnesses provided an adequate

foundation for taking the supervisor out of M. S.'s visitation with R. S. and J. S. is chilling.

The scope of review in a bench-tried case is limited: a trial court's decree should be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (1976). An appellate court should set aside a judgment because it is against the weight of the evidence cautiously and only when it is left with a firm belief that the judgment is wrong. *Lewis v. Gibbons*, 80 S.W.3d 461, 466 (Mo. 2002). When a case involves the custody of children the discretion of the trial court is especially broad. *T. C. H. v. K. M. H.,* 784 S.W.2d 281, 283 (Mo.App.E.D. 1989). But the judgment in such a case nonetheless must be reversed when an appellate court "is firmly convinced that the welfare of the child requires some other disposition." *Id.*

M. A. has reviewed the record extensively in her initial brief. Appellant's Br. at 6-28, 50-58. That review demonstrates that the trial court's fact-finding may be affirmed only at the unreasonable peril of R. S. and J. S. The most stark illustration of the undependability of that fact-finding is the court's determination that completion of the BSI offender treatment program alone is conclusive proof that a pedophile has been "rehabilitated," which the court parlayed into findings that "the risk that Father will abuse R. S. in the future is low" and that "J. S. is not at risk from Father," and then into the court's order that M. S.'s visitation with J. S. no longer would be supervised its declaration that the unsupervised visitation

with R. S. was a foregone conclusion. Legal File at 200-02. In fact Marie Clark, who operates BSI and oversaw M. S.'s court-ordered treatment there for six years, testified that M. S. was at low risk to reoffend *only if his visitation with both children was supervised.* Ex. 6 at 22, 97.

Close review of the record in this case demonstrates that the facts found and conclusions reached by the trial court were wrong. The Court of Appeals rejected the trial court's findings with respect to the best interest of J. S. Its reasoning was perfectly referable to R. S. *M. A. v. M. S.* at *14. The Court of Appeals' analysis was sound and the results it reached were correct. The judgment of the Circuit Court awarding M. S. unsupervised visitation with J. S. and promising him the same with R. S. should be reversed.

VI.

The Circuit Court's finding that the best interests of R. S. and J. S. would be served by granting M. S. joint legal custody of them was against the weight of the evidence.

M. S. argues that the trial court's award of joint legal custody was supported by evidence that M. A. had interfered with his visitation and had failed to confer with him on issues affecting the children. Resp.'s Br. at 53-55. No evidence whatsoever could have supported a finding that M. S. and M. A. had the capacity for shared decision-making that is required to support an award of joint custody. Further, the only explanation offered by the trial court for its modification of the existing custody decree was that M. A. had "failed to confer with [M. S.] on major issues, including medical decisions, as set forth in the Parenting Plan." Legal File at 203. M. S.'s own testimony rendered that finding unsound. Tr. at 47. Any evidence of inadequate communication between M. S. and M. A. was vastly outweighed by evidence that was utterly inconsistent with granting M. S. the power over his children's lives that is inherent in joint legal custody.

M. S. makes no mention of the requirement that a joint custody award be supported by substantial evidence of parental "willingness and ability to share the rights and responsibilities of child-rearing" after divorce. *Burkhart v. Burkhart,* 876 S.W.2d 675, 680 (Mo.App.W.D. 1994). In the absence of such a showing a different arrangement must be ordered:

> Where the record is devoid of substantial evidence that the parties have a commonality of belief concerning parental decisions and the willingness and ability to function as a unit in making those decisions, it is error for the trial court to award joint legal custody.

Id. The Court of Appeals correctly found that no evidence could have supported a finding that M. S. and M. A. would be able to share custody of J. S. and R. S.

M. S. offers no vigorous defense of the trial court's finding that M. A. was refusing to discuss the children's affairs with him. Six months after filing his motion, M. S. testified that M. A. had been conferring with him "about decision-making regarding the kids" throughout the pendency of the proceeding. Tr. at 47. He complained that M. A. did not solicit his opinion during those conferences, but he did not testify that he had offered any opinions or that M. A. had been unreceptive to his input. The trial court's finding that M. A.'s unwillingness to discuss matters pertaining to the children warranted a modification of their custody arrangement is not supported by that record.

Modification of a custody decree is appropriate only when a sufficient change in circumstances can be found and when "the child will substantially benefit from the [modification] and the welfare of the child requires it." *Reeves-Weible v. Reeves*, 995 S.W.2d 50, 57 (Mo.App.W.D. 1999). Assuming no absolute legal bar, a part of the change of custody equation in the present case must be the declaration of a public policy recognizing that parents who molest their children do re-offend, and that the state must protect children who have

suffered such abuse from its recurrence. § 452.400.1. The record in this case does not support a finding that R. S.'s and J. S.'s welfare required that M. S. be made their joint legal custodian. M. S. bore the burden of proving that requirement. *V. L. P. v. J. M. T.*, 891 S.W.2d 577, 579-80 (Mo.App.E.D. 1995). He did not carry that burden. The Court of Appeals was correct in reversing the judgment of the Circuit Court on this issue.

VII.

The trial court's implicit findings that D. S. was willing and adequately trained to supervise visitation between M. S. and R. S., and that the best interest of R. S. would be served by authorizing D. S. to supervise that visitation, was not supported by substantial evidence and was against the weight of the evidence.

The Circuit Court found D. S. fit and able to supervise her husband's visitation with the child whom he molested throughout the time that father and child resided together. M. S. argues that the paucity of evidence regarding D. S.'s qualifications for and attitude regarding that role is of no moment:

> No evidence was presented to the court that contradicted Father's views regarding D. S. The court thus had no reason not to believe that D. S. was a responsible adult, suitable to supervise any visits with R. S.

Resp.'s Br. at 57. That position cannot be squared with the remarkable duty of courts to guard the welfare of children whose custody they adjudicate. The record in this case was inadequate to support the trial court's action, and the portion of the judgment authorizing D. S. to supervise her husband's visitation with R. S. should be reversed.

When a child is before any court and his or her welfare is at issue, "the welfare of the child is the primary concern of the court." *Vangundy v. Vangundy*, 937 S.W.2d 228, 231 (Mo.App.W.D. 1996). That concern is so weighty that the

judge in a custody proceeding does not serve in the first instance as a "neutral arbitrator," but rather "has an affirmative duty to determine the best interests of the child" that eclipses even its responsibility to accord the parties a fair trial. *Id.* Nothing in the evidence or the judgment suggests that the approval of D. S. as a visitation supervisor was consistent with the discharge of that judicial duty.

M. S.'s contention that no authority exists for M. A.'s insistence upon standards for this appointment—for the selection of an adult upon whom a court will depend to have the intelligence, judgment, patience, courage, and fortitude to watch for, recognize, and immediately halt inappropriate behavior by an adult denied unsupervised visitation because of his sexual molestation of the very child—is wrong. That burden to determine and enforce the best interests of the child is authority enough for insisting upon a principled approach to the selection of visitation supervisors.

The notion that willy-nilly or shot-in-the-dark is a good enough method for choosing someone to supervise his visits with R. S. also ignores the record in this case. Marie Clark of Behavioral Science Institute testified about the rigor of supervision required when child molesters spend time with their children: "[W]e want face-to-face, one-on-one supervision at all times." Ex. 6 at 28. Each of the prior custody decrees designated at least one agency, organization, or mental health professional to qualify and approve supervisors for M. S.'s visitation with R. S. and J. S.. Legal File at 31, 84, 105.

M. S. contends that the trial court acted reasonably and responsibly "[i]n the absence of evidence proving that D. S. is an inappropriate supervisor." Resp.'s Br. at 57. The gravity of the matter required something very different from that court, which alone had knowledge that D. S. would be authorized to oversee visitation between R. S. and M. S. Many pertinent questions were left unanswered. Those questions included:

• Was D. S. willing to supervise the visitation?

• What steps was she prepared to take in the event of conflict between R. S. and M. S.?

• How had she handled and fared in verbal and physical confrontations with her husband?

• What physical contact would she consider appropriate and what contact inappropriate?

• How much time did her own children spend at her residence, and how would she manage to supervise visitation between R. S. and M. S. while attending to the needs of those other children?

• Would she contemplate leaving R. S. alone with M. S.?

• Did D. S. have any record of criminal conviction or parental neglect?

• Did D. S. enjoy primary or joint custody of her own children, and if not why?

The Circuit Court approved D. S. to supervise visitation between her husband and his child despite a yawning void of evidence that might make that selection reasonable. This Court should reverse that portion of the judgment.

CONCLUSION

The judgment of the Circuit Court should be reversed for the reasons set forth in the appellant's brief and this reply brief. This Court should remand the case to the Circuit Court with instructions to terminate visitation between M. S. and R. S. and J. S. pursuant to § 452.400.1, Mo.Rev.Stat. Alternatively, the case should be remanded with instructions to enter a judgment allowing nothing more than supervised visitation with either child. Upon remand the Circuit Court should be instructed to enter a judgment restoring the legal custody of R. S. and J. S. to M.A., and to refrain from authorizing M. S.'s current wife to supervise visitation between M. S. and either child.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Mo.R.Civ.P. 84.04, 84.05, and 84.06. The brief contains 7,210 words, excluding the cover, signature block, and certificates of compliance and service, as determined by the software application Microsoft Word for Macintosh version 2004. The diskette filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

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